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IN THE

Supreme Court of the United States

October Term 1942

No. 379.

TITLE INSURANCE AND TRUST COMPANY, a corporation,
Petitioner,

vs.

HARRY C. MABRY, as Executor of the Last Will and Testament of William J. Garland, Deceased, *et al.*,
Respondents.

Brief of Respondent William C. Mathes, as Guardian Ad Litem, in Opposition to the Petition for Writ of Certiorari.

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May It Please The Court:

My appointment as guardian *ad litem* by the trial court charges me with the duty of representing the interests of the unborn and unascertained remaindermen involved in the case at bar [R. pp. 578-580, fols. 1732-1739]. I therefore appear *in propria persona* in my representative capacity, to oppose the petition for a writ of certiorari to review the final judgment of the courts of California in this cause.

The petitioner's request for certiorari is predicated entirely upon the contention that here the California courts

have decided "a federal question of substance . . . in a way probably not in accord with applicable decisions of this Court". (Rule 38, par. 5(a); Petition, p. 3.) The "applicable decisions" cited by the petitioner are (1) *Hansberry v. Lee*, 311 U. S. 32, 85 L. Ed. 22, 61 S. Ct. 115 (1940) and (2) *Riley v. New York Trust Co.*, ... U. S. ....., 86 L. Ed. (Adv. Ops.) 551, 62 S. Ct. 608 (1942).

It is submitted that no ground is presented, and none exists, for a review of the decision of the state court by this Honorable Court.

Statement of the Case.

The case is fairly stated in the opinion of the District Court of Appeal, which is reported at 51 Adv. Cal. App. 379; 124 Pac. (2d) 659 [R. pp. 599-602]. It is believed, however, that the following recital may prove of assistance.

William J. Garland created the trust in 1931, apparently at the behest of his then wife Alzoa, now Alzoa Scott. William thereafter brought this action to rescind the entire trust upon the ground of fraud, undue influence and mistake and to compel the petitioner, as trustee, to restore to him the properties he had previously conveyed to the trust [R. pp. 1-98]. An amendment to the complaint was later filed requesting the alternative relief of reformation of the trust. As thus amended, the complaint sought (1) outright rescission and cancellation of the entire trust and (2) reformation of the trust in the event complete rescission could not be had [R. pp. 337-360].

California courts long ago adopted the procedure of permitting a plaintiff in an action for rescission to seek in

the alternative some other relief such as reformation or damages, in the event the remedy of rescission should prove to be for any reason not available to the plaintiff. As the Supreme Court of the state said in *Walsh v. Majors*, 4 Cal. (2d) 384, 398, 49 Pac. (2d) 598 (1935):

> "In an equitable action for rescission . . . the plaintiff may state the facts surrounding the transaction and pray for any and every kind of relief to which under the facts he may show himself entitled . . . It has been held in such a situation that when the jurisdiction of equity attaches for any purpose it attaches for all purposes, among others, for assessing and awarding damages where damages are proper, as where rescission has become impossible, it being the duty of a court of equity to adjust all the differences arising from the cause of action presented and to leave nothing for further litigation."

To the same effect, see:

Bancroft v. Woodward, 183 Cal. 99, 101-102, 190 Pac. 445 (1920);

Montgomery v. McLaury, 143 Cal. 83, 87, 76 Pac. 964 (1904).

Alzoa, her four children, and all other living beneficiaries of the trust, were joined with the trustee as parties defendant. The trustee defended upon the ground, among others, that the unborn remaindermen were indispensable parties to the action. The court thereupon appointed me to represent the interests of the unborn [R. pp. 574-580].

All parties other than the trustee arrived at a compromise of the litigation, which they submitted to the trial

court for approval [R. pp. 540-558]. The trustee then filed a statement in opposition to the compromise, alleging that "the proposed compromise is unfair, unjust and inequitable to the unborn and unknown recipients of the corpus", and contending that the trial court not only lacked jurisdiction, but was powerless to acquire jurisdiction through the appointment of a guardian *ad litem* or otherwise, to affect the interests of the unborn remaindermen by its judgment approving any compromise [R. pp. 566-572].

After a full hearing of the matter, the trial court found, *inter alia*:

> "That there is a present substantial and actual risk to all the beneficiaries of said trust, other than plaintiff, including the unborn and unknown remaindermen thereof, if the . . . action be not compromised . . . or if the matter should proceed to trial upon the complaint and amendments to the complaint and the various answers on file thereto, in that plaintiff may prevail at the trial of said action and that the beneficiaries of said trust other than plaintiff, including the unknown and unborn remaindermen thereof, may or might lose all the benefits now conferred upon them by said declaration of trust, but under said compromise there is irrevocably saved and preserved to and for them the major portion of such benefits; that it is to the advantage of said beneficiaries of said trust, including the unborn and unknown remaindermen thereof, . . . to settle and dispose of said action on the basis of and in accordance with the agreement of compromise referred to in said petition to compromise; that the said compromise is not unfair, unjust or inequitable in any degree to the unborn or unknown recipients of the

corpus of said trust upon the termination thereof, but, on the contrary, said compromise is fair, just and equitable to, and to the best interests of, all persons now interested and all persons who at any time in the future may or might be or become interested in said trust and its assets and properties, including the unborn and unknown remaindermen" [R. pp. 519-520, fols. 1557-1560].

The trial court thereupon overruled the trustee's objections and decreed the compromise [R. pp. 516-528].

The trustee appealed from that decree to the Supreme Court of California [R. p. 533, fols. 1597-1599; p. 534, fols. 1600-1602]. After briefs had been filed, the California Supreme Court ordered the cause transferred to the intermediate appellate court—the District Court of Appeal—for hearing and determination [R. p. 612, fol. 623].[1]

The District Court of Appeal affirmed the judgment of the trial court [R. pp. 611-612, fols. 621-623]. The trustee then petitioned the California Supreme Court to hear and determine the cause, under Rule XXX (§6) of that court which provides:

"Petitions for hearing in the Supreme Court after decision by the District Courts of Appeal will be granted only when it shall appear necessary in order to secure uniformity of decision or the settlement

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[1]"The supreme court shall have power to order any cause pending before the supreme court to be heard and determined by a district court of appeal, and to order any cause pending before a district court of appeal to be heard and determined by the supreme court." *Constitution of California*, Art. VI, §4(c); [Cal. Stats. 1929, XX-XXIV; Appendix to Petition, p. 2].

> of important questions of law. Such petitions must embrace a statement of the grounds upon which such necessity is claimed to exist, otherwise the petition shall be denied."[2]

Following consideration of the trustee's petition, the California Supreme Court entered its order as follows:

> "Appellant's (Title Insurance and Trust Company) petition for hearing denied". [R. p. 612, fol. 623.]

It is informative to consider the effect under California procedure of the order just quoted. This cause being a "case in equity", the appeal was properly taken as above stated to the Supreme Court of the State in the first instance [Constitution of Calif., Art. VI, §4; Appendix to Petition, p. 1]. Accordingly, upon consideration of the trustee's petition for a hearing of the cause, the California Supreme Court was duty bound, upon the petitioner's request, "to look into the record to see whether anything deserving consideration has been overlooked in deciding the cause, or any of the facts misconceived in material particulars".

As the California Supreme Court said upon denying the petition for a hearing in *Burke v. Maze*, 10 Cal. App. 206, 211-212; 101 Pac. 438, 440-441 (1909):

> "In causes properly appealed to this court and referred by us to the district court for hearing and decision . . . if it is contended that the case stated

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[2]18 Cal. (2d) 24 (1941).

in the opinion of the district court of appeal differs materially from the case as it appears in the record, we feel bound to look into the record to see whether anything deserving consideration has been overlooked in deciding the cause, or any of the facts misconceived in material particulars. If so we order a rehearing notwithstanding the opinion of the district court may be correct on its face, because the complaining party has a right to the opinion of this court upon the precise case shown by the record."

See, also:

McDonough v. Goodcell, 13 Cal. (2d) 741-747, 91 Pac. 1035 (1939).

Moreover, it is a frequent practice of the California Supreme Court, upon denying a petition for a hearing, to "disapprove" or to "withhold approval" of specified portions of the opinion of the District Court of Appeal embodying statements as to the law which are deemed by the higher court to be erroneous or doubtful.

See:

28 *Calif. L. Rev.*, note pp. 81, 85, 88-91 (1939);
13 *So. Calif. L. Rev.*, note pp. 461, 464-466 (1940).

The California Supreme Court denied the petition for a hearing in the case at bar without comment [R. p. 612, fol. 623]; and the trustee now requests this Honorable Court to review the decision of the California District Court of Appeal.

Summary of the Argument.

The petition for a writ of certiorari to review the final judgment of the courts of California in this cause should be denied, for the following reasons:

First: The petitioner has failed to show affirmatively that this Honorable Court has jurisdiction. Specifically there has been no affirmative showing that the petitioner has or could suffer any injury as a result of the claimed denial of due process to the unborn remaindermen;

Second: It is sufficient to satisfy the requirements of due process that there was virtual representation of the unborn remaindermen; and

Third: The appointment of a guardian *ad litem* charged with the duty of representing the interests of the unborn remaindermen satisfied every possible requirement of due process.

ARGUMENT.

I.

The Petitioner Has Failed to Show Affirmatively Jurisdiction in This Court.

It is as Mr. Chief Justice Stone recently said in *Gorman v. Washington University*, ... U. S. ....., 86 L. Ed. (Adv. Ops.) 895, 897, 62 S. Ct. 962 (1942):

> "Upon application to this Court for review of the judgment of a state court it is the petitioner's burden to show affirmatively that we have jurisdiction."

There is no question here but that this is a "cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had . . ." (§237(b), Judicial Code, as amended; 28 U. S. C. A. §344(a)). And no contention is made that the petitioner has failed to comply with the provisions of Rule 12 (par. 1) or Rule 38 (par. 2) of the Rules of this Court.

> *Southern Power Co. v. North Carolina Pub. Service Co.*, 263 U. S. 508, 68 L. Ed. 413, 44 S. Ct. 164 (1924);
>
> *Lynch v. New York*, 293 U. S. 52, 54, 79 L. Ed. 191, 193, 55 S. Ct. 16 (1934);
>
> *Memphis Natural Gas Co. v. Beeler*, ... U. S. ....., 86 L. Ed. (Adv. Ops.) 745, 747, 62 S. Ct. 857 (1942).

It *is* submitted, however, that the petitioner stands in no position to invoke the jurisdiction of this Court by posing the constitutional question here sought to be presented. For even if it should be assumed *arguendo* that the procedure adopted by the state court fails to satisfy

the requirements of due process, the fact-to-be-faced still remains: *there has been no affirmative showing that the petitioner has or could suffer any injury* as a result of the assumed denial of constitutional rights.

In *McCabe v. Atchison, T. & S. F. R. Co.*, 235 U. S. 151, 162, 59 L. Ed. 169, 174, 35 S. Ct. 69 (1914), this Court declared:

> "It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial intervention."

In the language of Mr. Justice Black in *Voeller v. Neilston Warehouse Company*, 311 U. S. 531, 537, 85 L. Ed. 322, 326, 61 S. Ct. 376 (1941):

> ". . . this Court has many times declared the rule that only those who have been injured as the result of the denial of constitutional rights can invoke our jurisdiction on constitutional questions".

See:

Tyler v. Judges of Ct. of Registration, 179 U. S. 405, 48 L. Ed. 252, 21 S. Ct. 206 (1900);

Ashwander v. Tenn. Valley Authority, 297 U. S. 288, 347-348, 80 L. Ed. 688, 711, 56 S. Ct. 466 (1935).

The claimed unconstitutional deprivation is stated by the petitioner thusly:

> "Petitioner claimed in the state courts and claims here a right and immunity under the Fourteenth Amendment to the United States Constitution namely, that the judgment rendered by the State Court, ordering petitioner, as trustee, to pay $120,000 out of the corpus of a trust, which corpus belonged entirely to unborn and unascertained remaindermen

> who were not before the court, actually or by virtual representatives, and who therefore, were not and could not be bound by the judgment in this case, would be and was violative of the due process guaranties of said Fourteenth Amendment." (Petition, pp. 2-3.)

The alleged injury to the petitioner resulting from this asserted want of due process is sought to be spelled out as follows:

> "If the decree resulted from due process of law, the remaindermen would be bound thereby and the trustee protected in making such withdrawal and payment. But if (as the trustee has contended throughout) the procedure below was lacking in due process as to the remaindermen, the trustee will be compelled, at termination of the trust, to restore that $120,000 to corpus *out of its own funds*. Thus the trustee, petitioner herein, has a direct financial interest to the extent of at least $120,000 in the determination of this question. For this reason the trustee's own property is being taken without due process of law." (Petitioner's Br. p. 28.)

The petitioner then urges that "this case is not to be distinguished in principle" from *Buchanan v. Warley*, 245 U. S. 60, 73, 62 L. Ed. 149, 160, 38 S. Ct. 16 (1917), "where a *white* vendor was permitted to raise the constitutional deficiencies of an ordinance prohibiting occupation by a colored vendee"; or *Truax v. Raich*, 239 U. S. 33, 38-39, 60 L. Ed. 131, 134, 36 S. Ct. 7 (1915), where a state statute restricting employment of aliens was declared unconstitutional at the suit of an alien employee.

Thus the petitioner *assumes* that, even though the trustee is required to disburse the questioned $120,000 from

the corpus of the trust in obedience to the command of the highest court of the State of California, liability to remaindermen now unborn will result notwithstanding, if such remaindermen should later claim that the procedure followed by the California courts in this cause failed to satisfy the requirements of due process. *But the petitioner does not even attempt to show affirmatively that such is the law.*

The petitioner, a California corporation authorized to act as trustee in that state, appears in this cause as trustee of the Garland trust; and the orders embraced in the judgment herein are addressed to the petitioner solely in its capacity as such trustee [R. p. 521, fol. 1563, to p. 522, fol. 1566; p. 527, fol. 1579]. In the language of the California Supreme Court:

> "It has been said that the harshest demand that can be made in equity is to hold a trustee answerable . . . for a loss not caused by his willful default."
>
> *Estate of Cousins*, 111 Cal. 441, 451, 44 Pac. 182 (1896).

> "Where the trustee pays and distributes the trust fund under the direction and decree of the court, he is indemnified by the order itself, and needs no release. It would be impossible to hold any trustee responsible for obeying the orders of a court.
>
> *Perry on Trusts and Trustees* (7th Ed., 1929), Vol. II, §924, p. 1572.

See, also:

Pomeroy, Equity Jurisprudence (5th Ed., 1941), Vol. 4, §1064, pp. 179-180;

Scott on Trusts (1939), Vol. 3, p. 1903; Vol. 2, §192, p. 1046; §204, p. 1096;

Restatement, Restitution, §73;
Restatement, Trusts, §167, §178, §192, §201, §204, §220; Cal. Ann. §167, §178, §201, §204, §220.

In this cause, a portion of trust corpus is applied to effect a compromise of litigation challenging the very existence of the trust; and the payment is made by a corporate trustee in response to judicial command approved by the highest court of the state wherein the trustee is empowered to act. The likelihood that the trustee could incur liability for thus "obeying the orders of a court" would seem remote indeed.

See:

Ellig v. Naglee, 9 Cal. 683, 695 (1858);
Floyd v. Forbes, 71 Cal. 588, 594; 12 Pac. 726 (1887);
Estate of Schandoney, 133 Cal. 387, 390; 65 Pac. 877 (1901);
Estate of Wood, 159 Cal. 466, 471; 114 Pac. 992 (1911);
Moore v. Bowes, 8 Cal. (2d) 162, 166; 64 P. (2d) 423 (1937).

And possibility of injury to the trustee appears even more nebulous when it is recalled that the *res*—the trust corpus from which the $120,000 is directed by the state court to be paid—was within the jurisdiction of that court [R. p. 519, fols. 1556-1557]. Service of summons on the trustee holding the fund subjected the *res* to the jurisdiction of the trial court.

State v. Security Savings Bank, 186 Cal. 419, 427; 199 Pac. 791 (1921)
Standard Dredging Co. v. Title Insurance and Trust Co., 96 Cal. App. 93, 97; 273 Pac. 871 (1928).

Thus the case at bar is correctly characterized as a proceeding in *rem*, in so far as concerns disposition of the $120,000 from corpus of which the petitioner complains. This fact makes it even more difficult to perceive what possible constitutional right of the petitioner is infringed by the judgment of the state court decreeing compromise of the litigation.

See:

Security Savings Bank v. California, 263 U. S. 282, 287-288; 68 L. Ed. 307, 31 S. Ct. 661 (1923).

Compare:

Miedreich v. Lauenstein, 232 U. S. 236, 246-248, 58 L. Ed. 584, 590-591, 34 S. Ct. 309 (1914).

In this cause, as in *Corporation Commission v. Lowe*, 281 U. S. 431, 438; 74 L. Ed. 945, 949; 50 S. Ct. 397 (1930):

> "It was incumbent upon the appellee in invoking the protection of the 14th Amendment to show with convincing clarity that the law of the state created *against him* the discrimination of which he complained. An infraction of the constitutional provision is not to be assumed. On the contrary, it is to be presumed that the state in enforcing its local policies will conform its requirements to the Federal guaranties. Doubts on this point are to be resolved in favor of, and not against, the state." (Italics added.)

II.

The Procedure and Course of Litigation Adopted by the California Courts in This Cause Satisfy Every Possible Requirement of Due Process.

The test of due process in this cause was stated by Mr. Chief Justice Stone in *Hansberry v. Lee, supra,* 311 U. S. 42, 85 L. Ed. 27:

> ". . . there is scope within the framework of the Constitution for holding in appropriate cases that a judgment rendered in a class suit is *res judicata* as to members of the class who are not formal parties to the suit. Here, as elsewhere, the Fourteenth Amendment does not compel state courts or legislatures to adopt any particular rule for establishing the conclusiveness of judgments in class suits; . . . nor does it compel the adoption of the particular rules thought by this court to be appropriate for the federal courts. With a proper regard for divergent local institutions and interests, . . . this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it."

A. The Petitioner Has Conceded That the State Court Had Jurisdiction to Decree a Compromise Suitable to the Petitioner.

In the petitioner's "Return to Order to Show Cause and Answer to Petition to Compromise" filed in the trial court, the petitioner denied the jurisdiction of the court

to approve the *particular* compromise presented, but added: *"This does not mean that said action should not or may not be compromised upon a fair and equitable basis if the same can be arrived at."* [R. p. 571, fol. 1712.]

In other words, according to the petitioner, the state court had jurisdiction to decree approval of any compromise which the presumably disinterested trustee might deem proper, but no other. Thus, determination of the fairness or unfairness of the settlement would rest with the trustee, rather than the trial court. Necessarily then, the discretion of the trustee, and not that of the trial court, would control.

Now the petitioner appears to withdraw from that position. While still admitting that the state court had jurisdiction to proceed with the action to a "bitter end" judgment, the trustee now urges that there was no alternative; that the trial court did not have jurisdiction to approve any compromise, even a compromise sanctioned by the trustee. In other words, although the trust might well have been entirely destroyed had the litigation proceeded upon an all-or-nothing, win-or-lose basis, the petitioner now says there was no choice. It was either stand or fall.

Unchallenged, then, is the jurisdiction of the state court to terminate the litigation with a decree either rescinding or upholding the trust. Such equitable jurisdiction attached at the outset of the suit. The trustee concedes this also, but urges that when the parties began to talk settlement rather than fight, equity somehow lost jurisdiction.

Jurisdiction of a court of equity does not ebb and flow with the tempers of litigants [R. p. 608-609, fols. 617-619].

> "When . . . jurisdiction in equity attaches for any purpose, it is retained for all purposes . . ."
> *Montgomery v. McLaury, supra*, 143 Cal. 83, 90, 76 Pac. 964 (1904).

B. THERE WAS BOTH VIRTUAL AND ACTUAL REPRESENTATION OF ALL INTERESTS AFFECTED.

The trial court found:

> ". . . that all persons interested or who at any time in the future may or might be or become interested in said trust . . . and in its assets and properties, including the unborn and unknown remaindermen thereof, were and are duly and regularly represented and protected in this action and proceeding, . . . and were and are virtually and actually represented therein; . . . that the trustee . . . was and is before the court in this action and proceeding, and was and is subject to the jurisdiction of this court; and further that the trust . . . properties . . . are before and within the jurisdiction of this court for all purposes of this action and proceeding." [R. p. 519, fols. 1555-1557.]

These findings were adopted by the District Court of Appeal, and in effect approved by the California Supreme Court [R. pp. 607-609, fols. 615-619].

1. *It Is Sufficient to Satisfy the Requirements of Due Process That There Was Virtual Representation of the Unborn Remaindermen.*

As the court said in *Curran v. Pecho Ranch & Stock Co.*, 95 Cal. App. 555, 561-562, 273 Pac. 126 (hearing in Supreme Court denied, 1929):

> "The trial court has found that all parties interested were duly and properly represented. It is true that some of the parties hereto were not in being . . . *It is the interest which the court is considering*, and the owner merely as the guardian of that interest; *if then, some other persons are present who, with reference to that interest, are equally certain to bring forward the entire merits of the question, the object is satisfied for which the presence of the actual owner would be so required,* and the court may, without putting any right in jeopardy, take its usual course and make a complete decree. *The rule is made applicable to representation of persons living, as well as those unborn.*" (Italics added.)

The substance of the petitioner's attack upon the findings as to virtual representation is that the state courts "did not give proper consideration to the fundamental requirement that representation can only exist where *similar inducements* can fairly be expected to motivate the representative and the represented." (Pet. Brief, p. 19.)

But the trial judge and three justices of the District Court of Appeal and seven justices of the California Supreme Court found that the requisite "similarity of motive and inducement" did exist; that "the relationship between the parties present and those who are absent is

such as legally to entitle the former to stand in judgment for the latter" [R. pp. 606-607].

The petitioner relies upon *Hansberry v. Lee, supra*, 311 U. S. 32, 85 L. Ed. 22, and *Riley v. New York Trust Co., supra*, ... U. S. ....., 86 L. Ed. (Adv. Ops.) 551, 62 S. Ct. 608, but omits to point out wherein the decision of the state court in this cause is at variance with either of those decisions. The obvious inability of the plaintiff lot owner involved in *Hansberry v. Lee* to represent all other lot owners of the tract in litigating such a patently controversial matter as the validity of an agreement involving race restrictions is not open to question. Whether the interests of the absent lot owners would favor or oppose the race restrictions sought to be enforced by the plaintiff was rank conjecture. As this Court there explained:

> "It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation is either to assert a common-right or to challenge an asserted obligation . . . It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires."[3]

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[3]311 U. S. 44-45, 85 L. Ed. 28-29.

It has been noted already that in the case at bar fraud inducing the creation of the trust was the gravamen of the charge in the plaintiff's complaint; that the plaintiff's attack was directed at the very existence of the entire trust.

In *Stewart v. Oneal*, 237 Fed. 897, 903 (C. C. A. 6th, 1917), the court observed:

> "The representation is not of the interest of such nonparties, but . . . of the questions on which their interest depend . . .
>
> "In this case the interests of the numerous defendants were identical . . . *i. e.*, to uphold the will."

So, too, in the case at bar, the interests of all defendants—the life tenants, the remaindermen, and the trustee as well—are "identical" for the purposes of the doctrine of virtual representation; *i. e.*, to uphold the trust. Certainly the interests of the life tenants are "identical" with those of the remaindermen, because there can be no income without corpus and there can be neither income nor corpus if the trust be not upheld.

See:

Akley v. Bassett, 68 Cal. App. 270, 283, 285; 288 Pac. 1057 (hearing in Cal. S. Ct. denied, 1924);

Gunnell v. Palmer, 370 Ill. 206, 18 N. E. (2d) 202, 205 (1938).

See, also:

Restatement, Property, §182, §183, §184, §185.

2. *The Trustee Was the Only Party Defendant Indispensable to Due Process in the Case at Bar.*

The cause in effect involves an action by the plaintiff as grantor against the defendant trustee as grantee to rescind and cancel a conveyance upon the ground of fraud.

The fraud charged, placed in issue the existence of a trust at all; and the plaintiff was clearly entitled to have that issue litigated. Thus, as to jurisdiction, there were only two indispensable parties to this suit: the plaintiff and the trustee.[4]

Watkins v. Bryant, 91 Cal. 492, 27 Pac. 775 (1891);

Johnson v. Curley, 83 Cal. App. 627, 257 Pac. 163 (1927);

Pomeroy, Code Remedies (5th Ed., 1929), Sec. 254

The trustee is the only party defendant indispensable to due process in any action involving defense of the title to the corpus of the trust.

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[4]This is peculiarly so in California, where Sec. 863 of the Civil Code provides that: "The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust." *Estate of Troy*, 214 Cal. 53, 56, 3 Pac. (2d) 930 (1931). However, this would not be so where the dispute is factional among the beneficiaries, and does not involve an attack upon the existence of the whole trust; nor with respect to a dispute involving parties to a contract for the establishment of a trust. See: *Hutchins v. Security Trust & Savings Bank*, 208 Cal. 463, 281 Pac. 1026 (1929); *Lake v. Dowd*, 207 Cal. 290, 277 Pac. 1047 (1929); *Mitau v. Roddan*, 149 Cal. 1, 84 Pac. 145 (1906); and *O'Connor v. Irvine*, 74 Cal. 435, 16 Pac. 236 (1887), upon which the petitioner relies.

See:

Kerrison v. Stewart, 93 U. S. 155, 160; 23 L. Ed. 843, 845 (1876);

McArthur v. Scott, 113 U. S. 340, 396, 28 L. Ed. 1015, 1033, 5 S. Ct. 652 (1884);

Miller v. Texas & Pac. R. R. Co., 132 U. S. 662, 671-673, 33 L. Ed. 487, 494, 10 S. Ct. 206 (1890).

Indispensable parties are, of course, to be distinguished from mere *proper* parties. Although the trustee is the only indispensable party defendant, the beneficiaries may always be joined as proper parties.

Perry on Trusts and Trustees (7th Ed., 1929) Vol. I, §327.

In any suit involving, as does the case at bar, a serious and costly attack upon the very existence of the trust, no one would be heard to question the jurisdiction of a court of equity to approve—even over protests of the *cestuis que trust*—a compromise arranged by the trustee alone and calling for payment of a portion of the trust corpus in settlement. As the opinion of the District Court of Appeal states:

> "There is strong authority for the statement that if it were necessary in order that justice might be done to living parties, the interests of contingent remaindermen in this trust estate could be represented by the trustee. Indeed, the trustee has consistently and vigorously and ably presented to the trial court and to this court its opposition to the judgment approving the compromise and modifying the trust . . .

"It is stated in 120 A. L. R. at p. 886: 'In many cases involving trust estates the trustee, or the trustee together with the holders of other interests, are regarded as sufficiently representing unborn contingent remaindermen.' "[5] [R. p. 609, fols. 618-619.]

In denying its representation of the unborn remaindermen here, the trustee assumes a position analogous to that of the corporation which sought to deny representation of its majority stockholders in *Voller v. Neilston Warehouse Co., supra*, 311 U. S. 531, 537; 85 L. Ed. 322, 326-327, 61 S. Ct. 376 (1941). To paraphrase the language of the opinion there:

> The constitutional issue is here raised for the unborn remaindermen by the trustee, which admittedly itself had notice. This court has many times declared the rule that only those who have been injured as the result of the denial of constitutional rights can invoke our jurisdiction on constitutional questions. Yet here the trustee would have us say that it is sufficiently the representative of the unborn remaindermen to raise in their behalf the constitutional issue, but not

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[5]As the California Supreme Court said in *King v. Pauly*, 159 Cal. 549, 555, 115 Pac. 210 (1911):

> "While it is not 'necessary' to the decision of a question by an appellate court that there should be more than one good ground or reason, there may be more than one, and where the court bases its decision on two or more distinct grounds, each ground so specified is, as much as any of the others, one of the grounds, a ruling upon questions involved in the case, and not 'mere *dictum*.' "

To the same effect, see:

Clary v. Rolland, 24 Cal. 147, 150 (1864);
Camron v. Kenfield, 57 Cal. 551, 553-554 (1881);
Pugh v. Moxley, 164 Cal. 374, 377, 128 Pac. 1037 (1912);
Butter v. Wyman, 128 Cal. App. 736, 741, 18 Pac. (2d) 354 (hearing in Supreme Court denied, 1933).

sufficiently their representative to receive notice. We hold that, so far as the constitutional requirement of due process is concerned, it is in this case sufficiently their representative for both purposes.

There is nothing unusual in such a holding. The rights of parties are habitually protected in court by those who act in a representative capacity; an executor or administrator may act for the beneficiaries of an estate; a receiver may represent the collective interests of stockholders, partners, or creditors; a lawyer may appear for his client; and a corporation may represent the collective interests of its shareholders.

3. *The Appointment of a Guardian Ad Litem Gave Actual Representation to the Interests of the Unborn Remaindermen.*

The doctrine of virtual representation alone would have been sufficient to uphold the action of the state court. But here the protective force of that doctrine was augmented through actual representation by a guardian *ad litem* of the interests of the unborn remaindermen.

The necessity of providing a remedy in a suit where, as in the case at bar, it was impossible to bring physically before the court each party to be affected by the Chancellor's decree, gave rise to the well-established equitable concept of jurisdiction in "class suits" and acceptance of the "doctrine of virtual representation."

See:

Smith v. Swormstedt, 16 How. (U. S.) 288, 302-303, 14 L. Ed. 942, 948-949 (1853);

Miller v. Texas & Pacific R. R. Co., supra, 132 U. S. 662, 671-673, 33 L. Ed. 487, 494, 10 S. Ct. 206 (1890).

The guardian *ad litem* is a common-law device born of the necessity that the interests of persons having a legal existence, but not *sui juris*, be represented. The more common instances of persons laboring under legal disability to act are cases involving infants, insane, and other incompetent persons. None of these is *sui juris*. Yet all have a *legal* existence.

Neither is an unborn child *sui juris*. Yet it has *legal* existence, though *en ventre sa mere*, because the law takes cognizance of its rights.[6] By the same token, it is submitted that a contingent remainderman, not yet conceived, but whose rights the law recognizes and protects, has a legal existence—exists within the contemplation of the law—though not *sui juris*.

There is no reason of logic or policy which would admit equity's power to appoint a guardian *ad litem* to represent the interests of an infant in being, and at the same time deny such power with respect to a child *en ventre sa mere* or not yet conceived.[7] The test of the law is *legal*, not actual existence. Manifestly, if things exist within the contemplation of the law, as clearly do the rights of unborn remaindermen, then they are entitled to *legal* representation consistent with their legal recognition.

Correctly, the opinion of the District Court of Appeal states:

> "To aid it in the exercise of its jurisdiction to hear and determine this matter, the court appointed a guardian *ad litem* to represent and protect the interests of the contingent remaindermen. Courts of jus-

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[6]*California Civil Code*, §29.

[7]*Cf. Story, Equity Pleadings* (4th ed., 1848), §70.

tice as an incident of their jurisdiction have inherent power to appoint guardians *ad litem*. (Crawford v. Neal, 56 Cal. 321 (1880); *In re* Cahill, 74 Cal. 52, 15 Pac. 364 (1887); Carraway v. Lassiter, 139 N. C. 145, 51 S. E. 968, 971 (1905); Reynolds v. Reynolds, 208 N. C. 578, 182 S. E. 341 (1935).)" [R. p. 608, fol. 617.]

To the same effect, see:

Wilson v. D'Atro, 109 Conn. 563, 145 Atl. 161 (1929);

DuPont v. DuPont, 18 Del. Ch. 316, 159 Atl. 841 1932);

Robinson v. Barrett, 142 Kan. 68, 45 Pac. (2d) 587 (1935);

Lyman v. Lyman, 293 Pa. 490, 143 Atl. 200 (1928).

But the petitioner asserts:

"Consistent with due process of law, living persons may represent unborn and absent parties only in adversary proceedings, not in contractual dealings." (Petitioner's Brief, p. 26.)

In other words, again says the petitioner, the trial court had jurisdiction to litigate, but not to decree a compromise. This unique contention overlooks entirely the fact that the trial court, rather than the guardian *ad litem*, exercises the power to approve or disapprove a compromise. The guardian *ad litem* is but an arm of the court. As the California Supreme Court explained in *Cole v. Superior Court*, 63 Cal. 86, 89 (1883):

"*The court is*, in effect, *the guardian*—the person named as guardian *ad litem* being but the agent to

whom the court, in appointing him (thus exercising the power of the sovereign State as *parens patriae*) has delegated the execution of the trust; and through such agent the court performs its duty of protecting the rights of the infant or incompetent person." (Some italics added.)

Even more surprising is the petitioner's claim that:

"The only reason for the presentation of the compromise to the court was in an attempt to bind these unborn through so-called 'representation' by the very parties who had made this agreement." (Petitioner's Brief, p. 27.)

In making that unfounded statement, the petitioner was clearly forgetful of *Whitten v. Dabney*, 171 Cal. 621, 632, 154 Pac. 312 (1915), where the California Supreme Court pointed out:

"The court and not the guardian *ad litem* has the power to compromise the rights of minors under suitable circumstances."

4. *That the State Court Possessed Inherent Power, Under California Law, to Appoint a Guardian ad Litem to Represent the Interests of the Unborn Remainderman Is No Longer Open to Doubt.*

Section 187 of the California Code of Civil Procedure provides:

"Means to Carry Jurisdiction Into Effect. When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; *and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable*

process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code." (Italics added.)

The courts of California have long recognized the inherent "common-law power" of a court of equity to appoint a guardian *ad litem.*

Crawford v. Neal, 56 Cal. 321 (1880);
In re Cahill, 74 Cal. 52, 15 Pac. 364 (1887).

The District Court of Appeal in the case at bar expressly declared it to be the law of California that California courts, "as an incident of their jurisdiction, have inherent power to appoint guardian *ad litem.*"[8] [R. p. 608, fol. 617.]

Thus the trial court was unquestionably authorized to supplement virtual representation by the appointment of a guardian *ad litem* charged with the specific duty of giving actual representation to the interests of the unborn remaindermen.

The petitioner's argument to the contrary, which was repeatedly urged upon the state courts in this cause, refers to statutory procedure for the appointment of guardians *ad litem* pursuant to the provisions of Sections 372 and

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[8]As to the inherent equity powers of California Courts generally, see:

Sanford v. Head. 5 Cal. 297, 298 (1855);
Spreckels v. Hawaiian Com. etc. Co., 117 Cal. 377, 381, 49 Pac. 353 (1897);
Bechtel v. Wier, 152 Cal. 443, 446, 93 Pac. 75 (1907);
City of Pasadena v. Sup. Ct., 157 Cal. 781, 788, 793, 109 Pac. 620 (1910);
Tulare Irr. Dist. v. Sup. Ct., 197 Cal. 649, 660, 667, 242 Pac. 725 (1925);
Times Mirror Co. v. Sup. Ct., 3 Cal. (2d) 309, 331, 44 Pac. (2d) 547 (1935);
Est. of Lankershim, 6 Cal. (2d) 568, 572, 58 Pac. (2d) 1282 (1935).

373 of the California Code of Civil Procedure. Such argument overlooks entirely the fact, noted by the District Court of Appeal, that the inherent common-law power exists independently of any statute.

Moreover, the people of California have declared the public policy of the state with respect to the appointment of guardians *ad litem* to represent the interests of unborn persons. Section 13 of California's Torrens Title Act, an initiative measure, provides:

> "Upon the petition . . . of any person interested in the proceedings, the court shall appoint a disinterested person to act as guardian *ad litem* for minors and other persons under disability and for all persons not in being who may appear to have any interest in or lien upon the land."[9]

Thus, exercise of the inherent power of the California courts to provide independent representation for the interests of those unborn has been declared by the people of California to be not only a permissible practice, but also a desirable practice.

Reasoning by analogy from a statute is, of course, a long and soundly established technique. It is but the age-old principle of the "equity of the statute."[10]

See:

Canfield v. Security-First Nat'l. Bank, 8 Cal. App. (2d) 277, 284-287, 48 Pac. (2d) 133 (1935);
Canfield v. Security-First Nat'l. Bank, 13 Cal. (2d) 1, 13-16, 87 Pac. (2d) 830 (1939).

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[9]*Cal. Stats. 1915*, p. 1932, §13; *Deering's General Laws*, Act 8589, §13.

[10]See: *Stone, The Common Law in the United States* (1936), 50 Harv. L. Rev. 4, 12-13.

Whatever may have prompted its decision on the question, the determinative fact remains that the District Court of Appeal in the case at bar has declared the California law to be contrary to the petitioner's contentions; and the California Supreme Court has added implied approval. Thus any doubt which may have existed previously as to the California law with respect to the appointment of a guardian *ad litem* to represent the interests of unborn persons was effectively set at rest by the decision in this cause.

5. *This Court Will Apply the Law of California as Declared in the Opinion of the District Court of Appeal in This Cause.*

In *West v. American Tel. & Tel. Co.*, 311 U. S. 223, 236-237, 85 L. Ed. 139, 143-144, 61 S. Ct. 79 (1940) this Court said:

> "State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts. See Erie R. Co. v. Tompkins, *supra* (304 U. S. 78, 82 L. ed 1194, 58 S. Ct. 817, 114 A. L. R. 1487); Russell v. Todd, *supra* (309 U. S. 293, 84 L. ed. 762, 60 S. Ct. 527).
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> "Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise."

And as Mr. Justice Murphy said in *Stoner v. New York Life Ins. Co.*, 311 U. S. 464, 467, 85 L. Ed. 284, 287, 61 S. Ct. 336 (1941):

> "In particular this is true where the intermediate state court has determined the precise question in issue in an earlier suit between the same parties, and the highest court of the state has refused review."

See:

> *Six Cos. of Cal. v. Joint Highway Dist. No. 13*, 311 U. S 180, 188, 84 L. Ed. 114, 117-118, 61 S. Ct. 186 (1941).

Furthermore, this Court will apply the law of California as declared in the opinion of the District Court of Appeal at bar, even though it be assumed *arguendo*, as the petitioner contends, that the opinion declares the law with respect to appointment of guardians *ad litem* to be at variance with prior decisions of the California courts. In the language of Mr. Justice Reed in *Vandenbark v. Owens-Illinois Glass Co.*, 311 U. S. 538, 543, 85 L. Ed. 327, 330, 61 S. Ct. 347 (1941):

> ". . . the dominant principle is that *nisi prius* and appellate tribunals alike should conform their orders to the state law as of the time of the entry."

6. *The Appointment of a Guardian Ad Litem to Represent the Interests of Unborn Remaindermen Satisfied Every Possible Requirement of Due Process.*

At page 25 of its brief the petitioner urges:

> "The present attempt to innovate a procedure without prior statutory authority . . . is wholly subversive of established principles of due process of law."

From that "obsecure statement" the petitioner seems to argue that due process requires the existence of statutory authority for the appointment of a guardian *ad litem* of unborn persons.

As Mr. Justice White said in *Simon v. Craft*, 182 U. S. 427, 437, 45 L. Ed. 1165, 1171, 21 S. Ct. 836 (1901):

> "But the due process clause of the 14th Amendment does not necessitate that the proceedings in a state court should be by a particular mode, but only that there shall be a regular course of proceedings in which notice is given of the claim asserted, and an opportunity offered to defend against it."

In the light of that statement it is difficult indeed to perceive wherein the source, whether statutory or common-law, of the trial court's power to appoint the guardian *ad litem* could possibly have any bearing upon whether or not the procedure followed, measures up to the requirements of due process. As this Court observed in *West v. American Tel. & Tel. Co., supra*, 311 U. S. 223, 236, 85 L. Ed. 139, 143, 61 S. Ct. 79 (1940):

> ". . . the rules of decision established by judicial decisions of state courts are 'laws' as well as those prescribed by statute."

It has already been noted that the decision in the case at bar disposes of any question as to the inherent power of the trial court, wholly apart from statute, to appoint "a guardian *ad litem* to represent and protect the interests of the contingent remaindermen" [R. p. 608, fol. 617]. And it would seem equally clear that the procedure followed meets every requirement of due process.

See:

Loring v. Hildreth, 170 Mass. 328; 49 N. E. 652, 653 (1898);

Copeland v. Wheelwright, 230 Mass. 131, 119 N. E. 667, 669 (1918);

Fisher v. Fisher, 253 N. Y. 260, 170 N. E. 912, 913 (1930);

Gunnell v. Palmer, supra, 370 Ill. 206, 18 N. E. (2d) 202, 205 (1938).

See, also:

Wilson v. D'Atro, supra, 109 Conn. 563, 145 Atl. 161 (1929);

DuPont v. DuPont, supra, 18 Del. Ch. 316, 159 Atl. 841 (1932);

Robinson v. Barrett, supra, 142 Kan. 68, 45 Pac. (2d) 587 (1935);

Young v. Young, 255 Mich. 173, 237 N. W. 535 (1931);

Lyman v. Lyman, supra, 293 Pa. 490, 143 Atl. 200 (1928).

Compare:

Miedreich v. Lauenstein, supra, 232 U. S. 236, 241-242, 246-247, 58 L. Ed. 584, 589, 591, 34 S. Ct. 309 (1914);

Chaloner v. Sherman, 242 U. S. 455, 457-462, 61 L. Ed. 427, 434-435, 37 S. Ct. 136 (1917);

Milliken v. Meyer, 311 U. S. 457, 463-464, 85 L. Ed. 278, 283-284, 61 S. Ct. 339 (1941).

Conclusion.

Every state is free, as Mr. Justice Cardozo said in *Snyder v. Moss,* 291 U. S. 97, 105, 78 L. Ed. 674, 677, 54 S. Ct. 330 (1934), "to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

The sufficient answer to the petition for certiorari here is that no grounds have been presented and none exist for a review by this Honorable Court. In the last analysis the only ground claimed is that the California courts have decided this cause "in a way probably not in accord" with *Hansberry v. Lee, supra,* 311 U. S. 32, 85 L. Ed. 22, 61 S. Ct. 115 (1940), and *Riley v. New York Trust Co., supra,* ..... U. S. ....., 86 L. Ed. (Adv. Ops.) 551, 62 S. Ct. 608 (1942). It is readily apparent that the probability suggested by the petitioner is remote indeed from any actuality.

I therefore respectfully submit that the petition for a writ of certiorari should be denied.

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